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Pan Ocean Co Ltd v Daelim Corporation (DL LILAC) [2023] EWHC 391 (Comm)¹

An award has been remitted back to the original tribunal in a case concerning an appeal under s.69 of the Arbitration Act 1996 on a point of law. The questions considered in both the arbitration and the appeal centred upon whether a term should be implied into a charterparty that holds should be re-inspected without delay after a failed inspection. The outcome will impact Charterers' ability to claim off-hire for the intervening days following the Master calling for re-inspection and the re-inspection taking place.

The Commercial Court found that the Tribunal had erred in the application of the law and remitted the award for reconsideration.

The case also gives guidance of the interplay of ss.57 and 70(2) of the Act, and what is to be considered when examining whether a party has exhausted all available remedies before proceeding to appeal to court.

Facts

Owners Daelim Corporation and Charterers Pan Ocean Co Ltd entered into a time charter trip in early 2017 on an amended NYPE 1993 form for the carriage of urea in bulk on the "DL LILAC" (the "**Vessel**"). The relevant clause, for the purposes of this decision, was clause 69, which was headed "BIMCO Hold Cleaning/Residue Disposal For Time Charter Parties" and provided:

"Vessel's holds on delivery or on arrival 1st load port to be clean swept/washed down by fresh water and dried so as to receive Charterers intention cargoes in all respects free of salt, rust

scale and previous cargo residue to the satisfaction of the independent surveyor.

If vessel fails to pass any holds inspection the vessel to be placed off-hire until the vessel passes the same inspection and any expense/time incurred thereby for Owners' account."

Following delivery, on 16 February, the Vessel's holds were inspected and failed due to the presence of rust, paint flakes and cargo residue. At 15.30 on 19 February the Master notified agents that the holds were clean, requesting reinspection.

The Vessel had been ordered off-berth at 14.30 on 19 February and she shifted to the inner anchorage. The Vessel re-berthed on 3 March at 20.42 and was reinspected on 4 March at 07.00, at which point the Vessel passed.

Arbitration

Arbitration was commenced under the LMAA Terms 2017 in which Owners claimed for the hire during the period following the Vessel's holds being cleaned and her eventual reinspection. Charterers submitted that the Vessel was off-hire until she passed the hold inspection.

It was Owners' position that the Vessel was in all respects ready to load cargo from 15.30 on 19 February and that Charterers should have taken steps to arrange a reinspection but failed to do so. There was an allegation that the reason for such failure was a lack of availability of cargo. Owners argued that any subsequent loss of time was due to Charterers' breach in failing to arrange a reinspection with diligence and that they were not allowed to treat the Vessel as off-hire.

¹ <https://www.bailii.org/ew/cases/EWHC/Comm/2023/391.html>

Charterers rejected the implied term, arguing that they should not be burdened with the actions of an independent party, i.e. surveyors. Further, they argued that the application of an implied term would be inconsistent with the express clauses of the charterparty.

The tribunal found that:

"once the vessel advised that cleaning had been completed and the Master called for a reinspection, it was reasonable for the Charterers to be under an implied obligation to have the vessel re-inspected without delay. We concluded that keeping the vessel at anchor from 19 February until 3 March, a period of about 12 days, was unreasonable. The Charter Party did not contain any provision for dealing with such a situation and consequently without such an implied obligation the Charterers would be under no obligation to keep any delays to a minimum" (emphasis supplied)

Accordingly, the Tribunal found for Owners and that their claim succeeded in full.

Leave to appeal

Appeal under s.69 Arbitration Act

Charterers applied for leave to appeal on a point of law under s.69 of the Act, which was granted on the following issue of law:

*"whether there was an implied term of the subject time charter having the effect that where the vessel was off hire under clause 69 after a failed holds inspection and the Master advised that hold cleaning had been completed and called for a reinspection, the charterer was obliged 'to have the vessel re-inspected without delay'."*²

Andrew Barker J, in granting leave to appeal, opined that the Tribunal's decision that it was "reasonable for the charterers to be under such an implied obligation", was an unsound basis for the implication of a term.

Exhausting all available recourses under the LMAA Terms and s.57 Arbitration Act

There was a separate argument made by Owners that Charterers had failed to exhaust other available recourse under the arbitral rules or section 57 of the Act. Andrew Barker J did not agree that there was

any such failure as there was no ambiguity in the Award³. The basis upon which the arbitrators implied the term was clearly stated and the facts were sufficiently found.

Appeal

The Court considered three sub issues:

- 1 whether the Tribunal was in error in the test it used in implying a term;
- 2 if not, whether the content of the implied term imposed strict obligations, and on the Charterers alone; and
- 3 whether the implied term meant that the vessel was back on hire immediately after the Master called for a reinspection on the holds being cleaned.

On the question of Issue 1, the Court found that, notwithstanding the reference to reasonableness in the award, the Tribunal had, in fact, applied the correct legal test for implication of terms.

In relation to Issue 2, the Court found that the implied term imposed an obligation on both parties to take reasonable steps to cooperate to organise a reinspection without undue delay and that this was what the Tribunal had found, on a fair reading of the Award.

In relation to Issue 3, the Court found that the implied term required *"reasonable diligence to be exercised to have the vessel reinspected without undue delay"*⁴. It was common ground, and the Court found, that the Tribunal was wrong in law to determine that the Vessel was immediately back on hire once the Master had notified agents that she was ready for reinspection.

The Court held that the Tribunal needed to decide by which point the reinspection should have taken place in view of the implied obligation to exercise reasonable diligence to have the Vessel reinspected without delay to determine when the Vessel should have been back on hire.

The Award was remitted to the Tribunal for decision on the issues as highlighted by the Court.

Comment

This case demonstrates the Court's support for arbitration and showed that it would read awards *"in*

² Per Andrew Baker J, giving leave to appeal, as quoted in the case report.

³ Article 27 LMAA Terms 2017 provides:

"27(a) In addition to the powers set out in section 57 of the Act, the tribunal shall have the following powers to correct an award or to make an additional award:

(i) The tribunal may on its own initiative or on the application of a party correct any accidental mistake, omission or error of calculation in its award.

(ii) The tribunal may on the application of a party give an explanation of a specific point or part of the award."

⁴ Paragraph 53 of the judgment

a reasonable and commercial matter" in striving to uphold them.

In this case, a fair reading showed that the Tribunal had used the correct test when determining whether the term was to be implied but that they had erred in their application of the law in finding a breach.

Finally, while it is certainly the case that the combined powers of s.57 Arbitration Act and article 27 LMAA Terms 2017⁵ are wide as regards a party's ability to request a clarification or further explanations of an award, they do not extend to reopening or overturning a tribunal's decision, even if that decision might be wrong in law (unless any such mistake was accidental). In those circumstances, the correct recourse was to Court under s.69.

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Contact us

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⁵ Article 28 LMAA Terms 2020